Supreme Court, U.S.
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No. 10-379

In The Supreme Court of the United States

COLUMBIA VENTURE, LLC,

Petitioner,

vs.

DEWBERRY & DAVIS, LLC,

Respondent,

and

UNITED STATES OF AMERICA,

Party in Interest.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

STEVE ALLEN MATTHEWS
Counsel of Record
MANTON M. GRIER
WILLIAM C. BOYD
B. ERIC SHYTLE
HAYNSWORTH SINKLER BOYD, P.A.
Post Office Box 11889
Columbia, SC 29211-1889
(803) 779-3080
smatthews@hsblawfirm.com
Counsel for Petitioner
Columbia Venture, LLC

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. May a government contractor that has supplied engineering services to FEMA, but that has not met the criteria of the "government contractor's defense" established in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), nevertheless obtain complete immunity under state law for intentional or negligent torts by invoking implied obstacle preemption under the National Flood Insurance Act, 42 U.S.C. §§ 4001-4129 (2006)?

2. Does the government contractor's defense established by *Boyle* apply only to equipment contracts, or also to service contracts?

RULE 29.6 STATEMENT

Pursuant to Rule 29.6, Petitioner Columbia Venture, LLC states that it is a privately held company. The South Financial Group, Inc. (parent corporation of Carolina First Bank), is a publicly held corporation that owns more than 10% of Petitioner. TD Bank Financial Group, also a publicly held corporation, is in the process of acquiring the outstanding common stock of The South Financial Group, Inc.

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The opinion of the United States Court of Appeals for the Fourth Circuit is reported at *Columbia Venture, LLC v. Dewberry & Davis, LLC*, 604 F.3d 824 (4th Cir. 2010). The order of the United States District Court for the District of South Carolina was not published but is included in the Appendix at App. 17.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Fourth Circuit, affirming the order of the District Court, was handed down on May 12, 2010. By order filed May 24, 2010, the Court of Appeals extended the time to file a petition for rehearing, and for a rehearing *en banc*, until June 7, 2010. A timely petition for rehearing and for rehearing *en banc* was denied on June 21, 2010. The District Court for the District of South Carolina had jurisdiction pursuant to 28 U.S.C. § 1332 (2006). The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291 (2006). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) (2006).

RELEVANT PROVISIONS INVOLVED

42 U.S.C. § 4102

§ 4102. Criteria for land management and use

(a) Studies and investigations. The Director is authorized to carry out studies and investigations, . . . with respect to the adequacy of State and local measures in flood-prone areas as to land management and use, flood control, flood zoning, and flood damage prevention, and may enter into any contracts, agreements, or other appropriate arrangements to carry out such authority.

. . . .

(c) Development of comprehensive criteria designed to encourage adoption of adequate State and local measures. On the basis of such studies and investigations, and such other information as he deems necessary, the Director shall from time to time develop comprehensive criteria designed to encourage, where necessary, the adoption of adequate State and local measures which, to the maximum extent feasible, will –

(1) constrict the development of land which is exposed to flood damage where appropriate,

(2) guide the development of proposed construction away from locations which are threatened by flood hazards,

(3) assist in reducing damage cause by floods, and

(4) otherwise improve the long-range land management and use of flood-prone areas,

and he shall work closely with and provide any necessary technical assistance to State, interstate, and local governmental agencies, to encourage the application of such criteria and the adoption and enforcement of such measures.

42 U.S.C. § 4104

§ 4104. Flood elevation determinations

(a) Publication or notification of proposed flood elevation determinations. In establishing projected flood elevations for land use purposes with respect to any community pursuant to section 1361, the Director shall first propose such determinations by publication for comment in the Federal Register, by direct notification to the chief executive officer of the community, and by publication in a prominent local newspaper.

(b) Publication of flood elevation determinations; appeal of owner or lessee to local government; scientific or technical knowledge or information as basis for appeal; modification of proposed determinations. The Director shall publish notification of flood elevation determinations in a prominent local newspaper at least twice during the ten-day period following notification to the local government. During the ninety-day period following the second publication, any owner or lessee of real property within the community who believes his property rights to be

adversely affected by the Director's proposed determination may appeal such determination to the local government. The sole basis for such appeal shall be the possession of knowledge or information indicating that the elevations being proposed by the Director with respect to an identified area having special flood hazards are scientifically or technically incorrect, and the sole relief which shall be granted under the authority of this section in the event that such appeal is sustained in accordance with subsection (e) or (f) is a modification of the Director's proposed determination accordingly.

(c) Appeals by private persons; submission of negativing or contradicting data to community; opinion of community respecting justification for appeal by community; transmission of individual appeals to Director; filing of community action with Director. Appeals by private persons shall be made to the chief executive officer of the community, or to such agency as he shall publicly designate, and shall set forth the data that tend to negate or contradict the Director's finding in such form as the chief executive officer may specify. The community shall review and consolidate all such appeals and issue a written opinion stating whether the evidence presented is sufficient to justify an appeal on behalf of such persons by the community in its own name. Whether or not the community decides to appeal the Director's determination, copies of individual appeals shall be sent to the Director as they are received by the community, and the community's appeal or a copy of its decision not to appeal

shall be filed with the Director not later than ninety days after the date of the second newspaper publication of the Director's notification.

(d) Administrative review of appeals by private persons; modification of proposed determinations; decision of Director; form and distribution. In the event the Director does not receive an appeal from the community within the ninety days provided, he shall consolidate and review on their own merits, in accordance with the procedures set forth in subsection (e), the appeals filed within the community by private persons and shall make such modifications of his proposed determinations as may be appropriate, taking into account the written opinion, if any, issued by the community in not supporting such appeals. The Director's decision shall be in written form, and copies thereof shall be sent both to the chief executive officer of the community and to each individual appellant.

(e) Administrative review of appeals by community; agencies for resolution of conflicting data; availability of flood insurance pending such resolution; time for determination of Director; community adoption of local land use and control measures within reasonable time of final determination; public inspection and admissibility in evidence of reports and other administrative information. Upon appeal by any community, as provided by this section, the Director shall review and take fully into account any technical or scientific data submitted by the community that tend to negate or contradict the information upon

which his proposed determination is based. The Director shall resolve such appeal by consultation with officials of the local government involved, by administrative hearing, or by submission of the conflicting data to an independent scientific body or appropriate Federal agency for advice. Until the conflict in data is resolved, and the Director makes a final determination on the basis of his findings in the Federal Register, and so notifies the governing body of the community, flood insurance previously available within the community shall continue to be available, and no person shall be denied the right to purchase such insurance at chargeable rates. The Director shall make his determination within a reasonable time. The community shall be given a reasonable time after the Director's final determination in which to adopt local land use and control measures consistent with the Director's determination. The reports and other information used by the Director in making his final determination shall be made available for public inspection and shall be admissible in a court of law in the event the community seeks judicial review as provided by this section.

(f) Reimbursement of certain expenses; appropriation authorization. When, incident to any appeal under subsection (b) or (c), the owner or lessee of real property or the community, as the case may be, incurs expense in connection with the services of surveyors, engineers, or similar services, but not including legal services, in the effecting of an appeal which is successful in whole or part, the Director shall reimburse

such individual or community to an extent measured by the ratio of the successful portion of the appeal as compared to the entire appeal and applying such ratio to the reasonable value of all such services, but no reimbursement shall be made by the Director in respect to any fee or expense payment, the payment of which was agreed to be contingent upon the result of the appeal. There is authorized to be appropriated for purposes of implementing this subsection, not to exceed $ 250,000.

(g) Judicial review of final administrative determinations; venue; time for appeal; scope of review; good cause for stay or final determinations. Any appellant aggrieved by any final determination of the Director upon administrative appeal, as provided by this section, may appeal such determination to the United States district court for the district within which the community is located not more than sixty days after receipt of notice of such determination. The scope of review by the court shall be as provided by chapter 7 of title 5, United States Code. During the pendency of any such litigation, all final determinations of the Director shall be effective for the purposes of this title unless stayed by the court for good cause shown.

P.L. 103-325.

SEC. 501. SHORT TITLE

This title may be cited as the "National Flood Insurance Reform Act of 1994."

. . . .

SEC. 584. RELATED TO STATE AND LOCAL LAWS.

This title and the amendments made by this title may not be construed to preempt, annul, alter, amend, or exempt any person from compliance with any law, ordinance, or regulation of any state or local government with respect to land use, management, or control.

STATEMENT OF THE CASE

Columbia Venture, LLC ("CV"), owns a tract of land along the Congaree River in Richland County, South Carolina, that is protected from flooding by a system of uncertified levees.

On August 12, 1999, FEMA issued a revised preliminary Flood Insurance Rate Map ("FIRM") and Flood Insurance Study ("FIS") for the Congaree River floodplain that placed a modest regulatory floodway on CV's property (along the base of CV's levees). The regulatory floodway is an area of the floodplain in which development is restricted.

Pursuant to the National Flood Insurance Act ("NFIA") (42 U.S.C. § 4001-4129, and specifically 42 U.S.C. § 4104 (2006)), FEMA allowed a 90-day appeal period from the revised preliminary FIS and FIRM. That Act establishes the National Flood Insurance Program ("NFIP"), which makes flood insurance available to residents of each flood-prone community that affirmatively opts to participate in the program

by adopting the minimum flood elevation determinations established by FEMA. The NFIA also permits local communities or affected land owners to appeal FEMA's flood elevation determinations to the agency based on scientific or technical evidence. The only substantive relief available to successful appellants is a modification of the Agency's flood elevation determinations. CV did not appeal.

On September 26, 2000, FEMA issued a new revised preliminary FIS and FIRM that vastly expanded the regulatory floodway on CV's property, moving it in places over a mile from the river.

FEMA permitted CV to appeal the new revised preliminary FIS and FIRM to the Agency, but rejected CV's appeal by a Letter of Final Determination issued August 20, 2001.

On October 19, 2001, CV appealed FEMA's final determination to the United States District Court for the District of South Carolina pursuant to the NFIA.

During the course of CV's judicial appeal, the district court ordered FEMA to identify the scientific and technical basis on which it had expanded the regulatory floodway on CV's property. In response, FEMA identified a specific two-dimensional hydraulic model, "existing12th292.ot2," that FEMA relied upon to expand the regulatory floodway on CV's property. CV had this hydraulic model examined by experts and discovered that the model was seriously flawed. Ultimately, CV brought suit against Dewberry & Davis, LLC ("Dewberry"), the engineering firm that

prepared the model, alleging gross negligence and intentional torts under South Carolina law. In its complaint against Dewberry, CV asserted claims for civil conspiracy, professional malpractice, injurious falsehood, and violation of the South Carolina Unfair Trade Practices Act (S.C. Code Ann. §§ 39-5-10 to -560 (1985 & Supp. 2009)).

In the action against Dewberry CV did not, however, seek to challenge FEMA's final flood elevation determinations or the location of the regulatory floodway; nor did CV seek any relief from FEMA. Rather, CV sought only money damages from Dewberry. CV did allege that the flawed model was concealed by Dewberry and/or FEMA during the course of its administrative appeal, thus preventing CV from obtaining the relief sought under the NFIA.

CV's judicial appeal of FEMA's final flood elevation determinations ultimately concluded on September 9, 2009, with the entry of an order of dismissal with prejudice and the execution and entry of a stipulation of compromise settlement whereby FEMA agreed to begin a restudy of the Congaree floodplain within one year and pay CV $75,000. Earlier the district court had vacated FEMA's final determinations for failure to publish notice in the *Federal Register* as required by 42 U.S.C. § 4104(a) (2006), but was reversed by the court of appeals, which found the error harmless. *Columbia Venture, LLC v. South Carolina Wildlife Federation,* 562 F.3d 290 (4th Cir. 2009).

On January 29, 2007, the district court denied Dewberry's motion to dismiss based on the government contractor's defense set forth in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). Later, however, the district court dismissed CV's second amended complaint against Dewberry under Rule 12(b)(6), Fed. R. Civ. P., on motion of Dewberry and the United States, which appeared as a party-in-interest. The district court held that all of CV's state law claims against Dewberry were preempted by the NFIA under the doctrine of implied obstacle preemption.

The court of appeals affirmed the 12(b)(6) dismissal, finding implied obstacle preemption under the NFIA. *Columbia Venture, LLC v. Dewberry & Davis, LLC,* 604 F.3d 824 (4th Cir. 2010).

Both the district court and the court of appeals concluded that permitting state law claims against FEMA contractors would constitute an obstacle to the purpose of Congress in enacting the NFIA by (1) increasing the cost of engineering services to FEMA, (2) reducing the number of engineering firms willing to serve FEMA, and (3) providing an alternative state remedy to challenge the engineering supporting FEMA's flood elevation determinations that could interfere with the limited administrative and judicial remedy Congress provided in the NFIA.

REASONS FOR GRANTING THE PETITION

The Fourth Circuit displaced traditional state-law remedies on its own surmise (unsupported by factual investigation or by Congressional direction) that allowing such remedies would increase certain costs and burdens to be borne by the federal government. This decision conflicts with the presumption against federal preemption, with the language of the statutory scheme in question, and with the great weight of applicable precedent. Accordingly, it is wrong as a matter of preemption jurisprudence.

The erroneous interpretation of generic obstacle preemption analysis is not, however, the primary issue in this petition. Instead, the primary issue is that the Fourth Circuit should not have applied generic obstacle preemption analysis *at all*, because preemption of claims against government contractors has been specifically addressed and carefully circumscribed by this Court's decision in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988).

The decision below, however, effectively seeks to overrule *Boyle*. Worse, it means that government contractors would enjoy limitless immunity upon a bare showing that potential damages might be passed along in costs charged to the federal government, that some contractors might decline work because of potential liability, and that federal law offers some related relief against the government (but not against the contractor). The first two of these requirements, of course, specifically attach under *Boyle*, and the third is not under *Boyle* a relevant criterion; but

Boyle also provides quite clearly that these requirements are *not sufficient* to utterly immunize the contractor.

This petition thus presents two specific questions appropriate for resolution on writ of certiorari. First, may a state-law claim against a government contractor be subject to generic and far-ranging obstacle preemption without meeting the specific requirements of the government contractor defense? The court below resolved this "important federal question in a way that conflicts with relevant decisions of this Court," namely *Boyle*. Sup. Ct. R. 10(c). Second, does the test articulated in *Boyle* apply to service contracts? This is "an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c).

A. GENERIC OBSTACLE PREEMPTION

Under the United States Constitution, federal law is the supreme law of the land. U.S. Const. art. VI, § 2. State law is preempted under the Supremacy Clause in the following three circumstances: (1) when Congress has clearly expressed an intention to do so (express preemption); (2) when Congress has clearly intended, by legislating comprehensively, to occupy an entire field of regulation (field preemption); and (3) when a state law conflicts with federal law (conflict preemption). *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). Conflict preemption requires a showing either that "it is impossible for a private party to comply with both state and federal

requirements" (direct conflict), or that "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (obstacle preemption). *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995) (quotations and citations omitted).

The decision below is predicated on obstacle preemption. The analytical difficulty with such preemption is the breadth of the articulated test and the inherent vagueness of the search for the "full purposes and objectives of Congress." Indeed, as the Fourth Circuit has noted, "preemption under a frustration of federal purpose theory is more an exercise of policy choices by a court than strict statutory construction." *Abbot v. Am. Cyanamid Co.*, 844 F.2d 1108, 1113 (4th Cir. 1988). In other words, a clear congressional directive, or a manifest conflict with federal law, will result in preemption on some other basis (*e.g.*, express, field, or direct conflict preemption). Obstacle preemption is of necessity a residual category, in which no such clear direction or conflict appears.

Members of this Court, accordingly, have become "increasingly skeptical of this Court's 'purposes and objectives' pre-emption jurisprudence." *Wyeth v. Levine*, 555 U.S. ___, ___, 129 S. Ct. 1187, 1205 (2009) (Thomas, J., concurring). A minority of this Court has recently observed in dissent that the presumption against preemption, in particular so-called obstacle preemption, "serves as a limiting principle that prevents federal judges from running amok with our

potentially boundless (and perhaps inadequately considered) doctrine of implied conflict pre-emption based on frustration of purposes." *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 907 (2000) (Stevens, J., dissenting). This concern is well founded, in that preemption raises important questions about the federal judiciary's "respect for the constitutional role of the States as sovereign entities." *Id.* at 887 (quotations omitted).

Within the genus of obstacle preemption, which simply craves reference to the "purposes and objectives of Congress," the cases have fallen into distinct species. In many cases, for example, this Court has considered Congress's purposes and objectives in authorizing agency promulgation of detailed safety or labeling standards. Sometimes this consideration has resulted in preemption, *see Geier*, 529 U.S. 861, and sometimes not, *see Wyeth*, 129 S. Ct. 1187. More relevantly, this Court has specifically considered the possibility that a state common-law action against a government contractor might frustrate the purposes and objectives of Congress. *See Boyle*, 487 U.S. 500.

This case presents a preemption question that is functionally identical, save for one meaningful distinction, to the question answered by this Court in *Boyle*.[1] That one distinction is that this case involves

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[1] There is arguably a second distinction, namely that there was no applicable federal statute in *Boyle*, while this case implicates the NFIA. This distinction is not meaningful, however, because the Fourth Circuit's stated reasons for preemption

(Continued on following page)

a service contractor, whereas *Boyle* involved an equipment contractor. If this Court were to conclude that *Boyle* applies to service contracts – a question it has not previously answered – then it should also conclude that the Fourth Circuit erred in ignoring it.

B. THE SCOPE AND MEANING OF *BOYLE*

In *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), a Marine helicopter pilot died in an off-shore crash during a training exercise. The pilot survived the initial impact. The helicopter, however, had an outward opening escape hatch that could not be opened because of the water pressure, and the pilot drowned. The pilot's father sued under Virginia law for the negligent design of the hatch. The defendant, a private contractor that had manufactured the helicopter, argued that it should not be held liable for complying with design specifications provided by the United States Department of Defense.

The challenge to defendant's argument was that the Federal Tort Claims Act ("FTCA") specifically exempts from its scope "any contractor with the United States." 28 U.S.C. § 2671 (2006). Therefore, the contractor was not entitled to immunity on the face of applicable federal law. This Court, however, found that the case involved "uniquely federal interests" for two reasons. First, the case touched on the

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in this case were essentially identical to those identified in *Boyle*.

"obligations to and rights of the United States under its contracts," and second, it related to "the civil liability of federal officials for actions taken in the course of their duty." *Boyle*, 487 U.S. at 504-05. This Court further explained the cogency of the federal interests in the case by noting the consequences of potential contractor liability: "The imposition of liability on Government contractors will directly affect the terms of Government contracts: either the contractor will decline to manufacture the design specified by the Government, or it will raise its price." *Id.* at 507.

This Court continued, however, by observing that the establishment of these "uniquely federal interests" was *not* sufficient to displace state law. Instead, they allowed the *possibility* of displacing state law, but *only if* "a 'significant conflict' exists between an identifiable 'federal policy or interest and the [operation] of state law,' or the application of state law would 'frustrate specific objectives' of federal legislation." *Id.* (internal citations omitted).

Of course, the "significant conflict" or the "specific objectives" mentioned cannot simply refer back to the possibility of higher costs or fewer contractors. Those were the very facts that allowed the possibility of contractor immunity *in the first instance*, and were clearly described by this Court as "a necessary, not a sufficient, condition for the displacement of state law." *Id.* Accordingly, this Court required that there be an *actual conflict* implicated by the private law suit. In particular, this Court noted that "the

state-imposed duty of care that is the asserted basis of the contractor's liability (specifically, the duty to equip helicopters with the sort of escape-hatch mechanism petitioner claims was necessary) is precisely contrary to the duty imposed by the Government contract (the duty to manufacture and deliver helicopters with the sort of escape-hatch mechanism shown by the specifications)." *Id.* at 509.

This observation, in turn, implicated the immunity for discretionary functions in the FTCA, *see* 28 U.S.C. 2680(a) (2006), because the particular objective to be served was the preservation of the government's discretion to design its military equipment as it sees fit. As this Court noted, such discretion "often involves not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness." *Boyle*, 487 U.S. at 511. Therefore, this Court declined to compromise that discretion by submitting government contractors to liability for agreeing to do what the government, in its discretion, directed them to do.

But these considerations, while resulting in a degree of immunity for the contractor, also suggested a narrow test. Thus, the government contractor defense established by *Boyle* displaces liability under state law only when "(1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the

use of the equipment that were known to the supplier but not the United States." *Id.* at 512.

A minority of this Court has since noted that *Boyle* itself was a "[r]egrettabl[e]" instance in which the Supremacy Clause was read to "give unelected federal judges *carte blanche* to use federal law as a means of imposing their own ideas of tort reform on the States." *Geier*, 529 U.S. at 894 & 894 n.9 (2000) (Stevens, J., dissenting). In this case, the lower court ignored even the strictures of *Boyle*, and thus greatly enlarged its scope. "Regrettable" or not, *Boyle* is the law; the question here presented is whether it should be applied in accordance with its terms or incautiously expanded.

By way of illustration, a recent case appropriately applying *Boyle* involved claims against military contractors that provided services at the Abu Ghraib military prison. *See Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009). The court concluded that the contractors were immune from liability based, in part, on this Court's decision in *Boyle*. In reaching that conclusion, however, the court applied an exhaustive consideration of the policy rationale for *Boyle* and its limited reach. Recognizing that the analysis in *Boyle* depended on the FTCA's exemption for discretionary functions, the court sought a similar basis for the immunity in *Saleh*. The court found this basis in the FTCA's exemption for "[a]ny claim arising out of the combatant activities of the military or naval forces . . . during time of war." 28 U.S.C. § 2680(j) (2006). Importantly, however, "the 'scope of

displacement' of the preempted non-federal substantive law must be carefully tailored so as to coincide with the bounds of the federal interest being protected." *Saleh*, 580 F.3d at 8.

The importance of *Saleh* to the instant case is that the D.C. Circuit, unlike the court below, was unwilling to displace all state law tort claims against a government contractor on the simple finding that allowing liability might increase the costs to, or contractors available to, the federal government. As noted above, those facts are the mere preconditions to the possibility of government contractor immunity. More to the point, those facts would presumably attach to *any* claim against *any* government contractor, for the threat of liability and the costs thereof will *always* be reflected in the availability of and prices charged by contractors. Therefore, beyond serving as the locus of the required "federal interest" in *Boyle*, those facts add nothing to the conflicts analysis. The proper application of *Boyle*, then, requires not only this tautological description of the consequences of liability, but also the identification of a specific conflict with a federal policy. In *Boyle*, that policy was preservation of the federal government's discretionary acts, while in *Saleh* it was the elimination of tort liability from the battlefield.

The court below, however, offered no such scrutiny of specific federal policies to be protected by preemption. Instead, the court below entirely displaced state law remedies because (1) "[t]he cost of defending such claims against independent contractors in

Dewberry's position will be transferred to FEMA through increased contract fees[, which] would increase the financial burden on the Treasury and hinder FEMA's efforts to implement the flood insurance program," and (2) the availability of state law claims "would undermine the limited appeals process chosen by Congress to enable FEMA to constantly reappraise the program and to expeditiously identify and disseminate information about flood-prone areas." *Columbia Venture, LLC v. Dewberry & Davis, LLC*, 604 F.3d 824, 831 (2010).

This conclusion is not, and makes no claim to be, sufficient to justify contractor immunity under *Boyle*. Moreover, this conclusion does not depend on findings that Dewberry's work was subject to "reasonably precise specifications," or that Dewberry warned FEMA of the deficiency of its work product. Thus the application of *Boyle* would require reversal.

The remaining question is whether *Boyle* applies to service contracts. This Court has not answered the question. The D.C. and Eleventh Circuits have concluded that it does. *See Saleh*, 580 F.3d at 9 n.6; *Hudgens v. Bell Helicopters/Textron*, 328 F.3d 1329, 1334 (11th Cir. 2003). In addition, the very case cited by *Boyle* to establish immunity for government contractors related to a service contract, namely the construction of dikes along the Missouri River pursuant to a federal government contract. *See Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18 (1940). On the other hand, some federal district courts have limited *Boyle* to equipment contracts. *See, e.g.*, *McMahon v.*

Presidential Airways Inc., 460 F. Supp. 2d 1315, 1329 (M.D. Fla. 2006); *Fisher v. Halliburton*, 390 F. Supp. 2d 610, 615-16 (S.D. Tex. 2005). Therefore, although the issue does not currently present a conflict among the circuits, it is an important question that this Court has not resolved.

C. OBSTACLE PREEMPTION OUTSIDE THE CONTEXT OF *BOYLE*

Of course, CV does not argue that claims against a government contractor could *never* be preempted on some basis other than the specific test articulated in *Boyle*. For example, it is easy enough to imagine an Act of Congress that expressly preempted state law claims against certain government contractors or a federal statute that imposed a different standard of care on a particular contracting activity. And, significantly, one of the complexities in *Boyle* is that the preemption there was traceable only to federal "policy," and not to a particular law.

But before invoking obstacle preemption to displace state law, this Court has always required the identification of a *substantive* federal policy or objective that is articulated in the applicable federal statute, regulation, or design specification. For example, in *Geier* the relevant substantive policy was embodied in a Federal Motor Vehicle Safety Standard, promulgated by the Department of Transportation after careful review, that established a mix of required restraint systems. *See Geier*, 529 U.S. at 864-65. Likewise, in *Wyeth*, this Court considered but

rejected the possibility that the Food and Drug Administration's approval of a warning label for the drug Phenergan established a federal policy sufficient to preempt the possibility of an inadequate warning suit under state law. *See Wyeth*, 129 S. Ct. at 1190-91. And in *Boyle* itself the substantive policy was the government's right to design its own military equipment. *See Boyle*, 487 U.S. at 508-09. Neither Congress nor FEMA, however, has established particular scientific or engineering methods to be used by a contractor, or otherwise expressed any particular substantive policy that would be undermined by state law suits. Accordingly, the court below did not identify any particular substantive policy to be protected by preemption.

Moreover, the NFIA itself presents no plausible implication of preemption and articulates no "purposes and objectives" that would be furthered by such preemption. As noted above, the only federal purpose or objective identified by the court below was that, at least in the supposition of the court, preemption would mean a larger pool of cheaper contractors. That possibility, however, is thoroughly contained within the *Boyle* analysis. All other implications in the NFIA are that Congress did *not* intend to preempt state law.

The act establishes a *voluntary* program for flood insurance. *See generally* 44 C.F.R. § 59.2 (2009). Local communities are not compelled to participate, and are permitted to join the program even if they adopt flood elevation determinations that are different from FEMA's so long as the ones they adopt are more

conservative than FEMA's (*e.g.*, higher base flood elevations or wider floodways). *See, e.g.*, 44 C.F.R. § 60.1(d) (2009) (FEMA's flood elevation determinations are considered minimum requirements to participate in the NFIP). Congress established a procedure in Section 4104 of the NFIA under which FEMA may establish flood elevation determinations for land use purposes. 42 U.S.C. § 4104 (2006). Congress did not, however, mandate that state or local governments adopt FEMA's determinations. Rather, Congress instructed FEMA to encourage the application of such criteria and the adoption of such measures. 42 U.S.C. § 4102 (2006). Also, in adopting extensive amendments to the NFIA in 1994, Congress expressed its intent not to displace state or local laws "with respect to land use, management or control." National Flood Insurance Reform Act of 1994, Pub. L. No. 103-325, § 584, 108 Stat. 2287 (2004). Thus, a state could authorize a state agency to establish flood elevation determinations as an alternative to those established by FEMA. Moreover, local communities could adopt the state determinations in lieu of FEMA's and still participate in the NFIP, so long as the state determinations were acceptable to FEMA.

It is implausible that Congress would express its intent not to displace state law that is at the core of the NFIA and NFIP but preempt by implication state law at the margin that does not pose a direct and clear conflict with a federal purpose. Permitting CV's suit against Dewberry to go forward would not in any way disturb FEMA's flood elevation determinations in

this case, even if CV were to prevail. In that event, FEMA may, or may not, choose to take another look at the scientific or technical basis supporting its flood elevation determinations. But even if FEMA felt that prudence required it to do so under such circumstances, that is not a sufficient obstacle to Congress's purpose in enacting the NFIA to justify preempting broad areas of state law.

Finally, as further developed in Section A, *supra*, the policy analysis employed by the court below is at odds with this Court's prior statements that obstacle preemption must be employed with great caution. "[T]his type of preemption should be limited to state laws which impose prohibitions or obligations which are in direct contradiction to Congress' primary objectives, as conveyed with clarity in the federal legislation." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 110 (1992) (Kennedy, J., concurring in judgment on basis of express preemption but refusing to join plurality's opinion that OSHA impliedly preempted the Illinois Hazardous Waste Crane and Hoisting Equipment Operators Licensing Act). "Any conflict must be 'irreconcilable. . . . The existence of a hypothetical or potential conflict is insufficient to warrant the preemption of the state statute.'" *Id.* (quoting *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982)). Implied preemption is not to be used "to expand federal statutes beyond their terms. . . ." *Bates v. Dow Agrosciences, LLC*, 544 U.S. 431, 459 (2005) (Thomas, J., dissenting in part and concurring in part in judgment holding that FIFRA's express

preemption of state labeling and packaging requirements preempts some, but not all, of peanut farmers' state law claims against pesticide manufacturer). "[I]t is for Congress, not [the] Court, to strike a balance between state tort suits and federal regulation." *Id.* at 458. "A freewheeling judicial inquiry into whether a state statute is in tension with federal objectives would undercut [this] principle that it is Congress rather than the courts that pre-empts state law." *Gade*, 505 U.S. at 111 (Kennedy, J., concurring in part and concurring in judgment).

In short, other than the federal interests identified in *Boyle* (viz., the general interest in spending less money and acting more expeditiously), the NFIA presents no purposes or objectives that would be furthered by haphazardly overriding traditional state law remedies for wrongful conduct.

D. IMPORTANCE OF THE QUESTIONS

As noted above, recent case law suggests that this Court has become increasingly concerned with the casual invocation of obstacle preemption to arrogate state sovereignty. CV respectfully suggests that the decision below presents a uniquely expansive example of this danger. *Of course* the threat of liability might increase the costs charged by a contractor, as it does in every other context. *Of course* some contractors (most notably, the incompetent or unqualified ones) might decline to do work for which they will be held financially accountable. And *of course* the

federal government generally would prefer to spend less money and have more willing contractors. This preference, then, would suggest a blanket contractor immunity; but this suggestion has been emphatically rejected by the FTCA, which expressly excludes federal contractors from its protection, and by *Boyle*, which contains its own careful limitations on contractor immunity.

In place of the Congressional determination in the FTCA and this Court's decision in *Boyle*, the court below proffers what amounts to a judicially crafted, open-ended, blanket immunity. This result is troubling enough in the context of the NFIA, where presumably it will have a somewhat limited effect. But the result would apply with equal force to innumerable other contexts – for example, that of military contractors. The *Saleh* case, discussed above, would have presented a much less compelling question if the D.C. Circuit had been content to simply observe that it would be cheaper to immunize private interrogators from state law liability. That court, however, recognizing the gravity of denying the states the ability to enforce their own laws, conducted a serious inquiry into the conflicting federal policies to be furthered by immunity. The court below should be required to do so as well.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

STEVE ALLEN MATTHEWS
Counsel of Record
MANTON M. GRIER
WILLIAM C. BOYD
B. ERIC SHYTLE
HAYNSWORTH SINKLER BOYD, P.A.
Post Office Box 11889
Columbia, SC 29211-1889
(803) 779-3080

Attorneys for Petitioner
Columbia Venture, LLC

September 16, 2010

COLUMBIA VENTURE, LLC, Plaintiff-Appellant, v. DEWBERRY & DAVIS, LLC, Defendant-Appellee, and UNITED STATES OF AMERICA, Party-in-Interest. UNITED STATES OF AMERICA; AMERICAN COUNCIL OF ENGINEERING COMPANIES; AMERICAN COUNCIL OF ENGINEERING COMPANIES OF METROPOLITAN WASHINGTON; AMERICAN SOCIETY OF CIVIL ENGINEERS; ASSOCIATION OF FLOODPLAIN MANAGERS, Amici Supporting Appellee.

No. 08-1318

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

604 F.3d 824

October 27, 2009, Argued
May 12, 2010, Decided

COUNSEL: ARGUED: Manton McCutchen Grier, HAYNSWORTH, SINKLER & BOYD, PA, Columbia, South Carolina, for Appellant. Sharon Swingle, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for the United States of America, Amicus Supporting Appellee.

James F. Lee, Jr., LEE & MCSHANE, PC, Washington, D.C., for Appellee.

ON BRIEF: Hamilton Osborne, Jr., James Y. Becker, Sarah Michaels Montgomery, HAYNSWORTH, SINKLER & BOYD, PA, Columbia, South Carolina, for Appellant.

Jonathan P. Rolfe, LEE & MCSHANE, PC, Washington, D.C.; Francis M. Mack, David A. Anderson, Mason M. Summers, RICHARDSON PLOWDEN & ROBINSON, PA, Columbia, South Carolina, for Appellee.

Gregory G. Katsas, Assistant Attorney General, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., W. Walter Wilkins, United States Attorney, Columbia, South Carolina, Michael Jay Singer, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for the United States of America, Amicus Supporting Appellee.

E. Duncan Getchell, Jr., Robert L. Hodges, Jeffrey S. Shapiro, Erin M. Sine, MCGUIREWOODS, LLP, Richmond, Virginia, for American Council of Engineering Companies, American Council of Engineering Companies of Metropolitan Washington, American Society of Civil Engineers, Amici Supporting Appellee.

David K. Mears, VERMONT LAW SCHOOL, Environmental and Natural Resources Law Clinic, South Royalton, Vermont; Jon Kusler, Associate Director, ASSOCIATION OF STATE WETLAND MANAGERS, Berne, New York, for Association of Floodplain Managers, Amicus Supporting Appellee.

JUDGES: Before MOTZ and SHEDD, Circuit Judges, and Jane R. ROTH, Senior Circuit Judge of the United States Court of Appeals for the Third Circuit, sitting

by designation. Judge Shedd wrote the opinion, in which Judge Motz and Senior Judge Roth joined.

OPINION BY: SHEDD

OPINION

SHEDD, Circuit Judge:

Columbia Venture, LLC appeals an order of the district court dismissing its second amended complaint with prejudice. *See* Fed. R. Civ. P. 12(b)(6). The court concluded that Columbia Venture's state law claims are preempted by the National Flood Insurance Act of 1968 ("NFIA"), 42 U.S.C. §§ 4001 *et seq.* For the following reasons, we affirm.

I.

A.

We review *de novo* a district court's order dismissing a claim under Federal Rule of Civil Procedure 12(b)(6). *See Duckworth v. State Admin. Bd. of Election Laws,* 332 F.3d 769, 772 (4th Cir. 2003); *see also AES Sparrow Point LNG, LLC v. Smith,* 527 F.3d 120, 125 (4th Cir. 2008) (holding that federal preemption is a legal question that we review *de novo*). To survive a Rule 12(b)(6) motion, a plaintiff must allege enough facts "to raise a right to relief above the speculative level" and must provide "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly,* 550 U.S.

544, 555, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). When considering an order dismissing a claim under Rule 12(b)(6), we assume all factual allegations in the pleadings to be true. *Erickson v. Pardus,* 551 U.S. 89, 94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007).

B.

Columbia Venture owns a large parcel of property along the Congaree River in South Carolina. In 1998, the Federal Emergency Management Agency ("FEMA") began a reassessment of flood elevation maps of this area. Pursuant to the NFIA, FEMA hired Dewberry & Davis, LLC ("Dewberry") as an independent contractor to provide engineering and related services to assist in the remapping effort. Dewberry provided the hydraulic model used to designate a large portion of Columbia Venture's property as part of the floodway. This designation prevented Columbia Venture from developing much of its property, thereby greatly reducing the property's value. Columbia Venture filed an administrative appeal of FEMA's determination pursuant to 42 U.S.C. § 4104 that was ultimately unsuccessful. *See Columbia Venture, LLC v. SC Wildlife Fed.,* 562 F.3d 290 (4th Cir. 2009) (per curiam) (holding that FEMA's failure to timely publish notice in accordance with

§ 4104 was harmless and did not warrant vacating FEMA's final determination).[1]

Columbia Venture then brought this action against Dewberry, alleging state law claims of professional malpractice, civil conspiracy, injurious falsehood, and violation of the South Carolina Unfair Trade Practices Act ("SCUTPA"). Columbia Venture contends that the hydraulic model provided by Dewberry, which was used to determine the flood elevations, is flawed and inaccurate. Columbia Venture also argues that FEMA concealed this information and the reasons for the changes in the floodway determination when it pursued its administrative appeal.

Pursuant to Rule 12(b)(6), Dewberry moved to dismiss the first amended complaint on the ground that the statute of limitations had run on Columbia Venture's claims. The district court denied the motion, holding that Columbia Venture had alleged sufficient facts to support a finding that it did not have notice of its potential cause of action against Dewberry. Columbia Venture then filed a second amended complaint, and Dewberry filed another motion to dismiss pursuant to Rule 12(b)(6). In this motion, Dewberry argued that the claims were

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[1] We note that, although not alleged in its complaint, Columbia Venture also filed a lawsuit against Richland County, South Carolina on August 19, 2004, for injuries allegedly caused by the final determinations.

preempted by the NFIA. Additionally, Dewberry argued that all of Columbia Venture's claims were time-barred and, alternatively, that the claims otherwise failed because Dewberry did not owe a duty of care to Columbia Venture. Dewberry also argued that Columbia Venture failed to properly allege a conspiracy claim, failed to properly allege an injurious falsehood claim, and did not state a claim under SCUTPA.

The district court dismissed the second amended complaint, holding that the NFIA preempts Columbia Venture's state law claims under a theory of obstacle preemption, which is a subset of implied conflict preemption. Specifically, the court held that permitting landowners to bring state law tort claims against FEMA's independent contractors would obstruct the purposes of the NFIA because such litigation would increase the cost to FEMA and hinder its efforts to implement the flood insurance program. Further, the court held that such claims would destroy the balance struck by Congress in establishing the limited administrative appeals process under 42 U.S.C. § 4104. Because it held that Columbia Venture's claims are preempted, the court did not reach Dewberry's alternative theories for dismissal.

II.

The initial question we have to address is one we raised at oral argument: whether the district court addressed the issue of preemption prematurely under constitutional avoidance principles. We have held

that federal preemption of state law is a constitutional question because it is premised on the Supremacy Clause of the United States Constitution, and when a party provides alternative independent state law grounds for disposing of a case, courts should not decide the constitutional question of preemption before considering the state law grounds. *See Bell Atl. Md., Inc. v. Prince George's County,* 212 F.3d 863, 865 (4th Cir. 2000) (citing *Ashwander v. Tenn. Valley Auth.,* 297 U.S. 288, 341, 346-47, 56 S. Ct. 466, 80 L. Ed. 688 (1936) (Brandeis, J., concurring)); *see also H & R Block E. Enter., Inc. v. Raskin,* 591 F.3d 718, 723-24 (4th Cir. 2010) (applying *Bell Atlantic* to remand the case for consideration of whether the statute applied to the plaintiff before deciding whether it was preempted). In this context, "an independent state law ground is one that allows us to avoid deciding a constitutional question." *MediaOne Group, Inc. v. County of Henrico,* 257 F.3d 356, 361 (4th Cir. 2001).

Here, Dewberry asserts five state law grounds for dismissal. Three of these grounds – that Columbia Venture failed to state a conspiracy claim, an injurious falsehood claim, or South Carolina Unfair Trade Practices claim – are clearly not independent state law grounds that allow us to avoid deciding the preemption issue because they only relate to one of the five claims. *See id.* at 361. Accordingly, we need not address these issues under *Bell Atlantic.*

Dewberry also argues that Columbia Venture's claims fail because it did not owe a common law duty of care to Columbia Venture. However, Columbia

Venture's SCUTPA claims are not governed by a common law duty of care but by S.C. Code Ann. § 39-5-140. Therefore, the lack of duty defense is not an independent state law ground because a holding that Dewberry owed no common law duty to Columbia Venture would still leave the preemption issue to be resolved with respect to the SCUTPA claim. *See MediaOne Group, Inc.*, 257 F.3d at 361. Accordingly, we need not address this theory under *Bell Atlantic*.

Finally, Dewberry argues that all of Columbia Venture's claims are time-barred. Unlike Dewberry's other grounds for dismissal, this ground is potentially dispositive of all of the claims because all claims are governed by a three-year statute of limitations period. S.C. Code Ann. §§ 15-3-530(5), 39-5-150. Under *Bell Atlantic,* this independent state law ground must be addressed before we reach preemption. Although we have discretion to address this issue or to remand it for consideration by the district court, the district court already denied Dewberry's motion to dismiss on this ground with regard to the first amended complaint. Because we see no distinction between the amended complaint and the second amended complaint as they relate to the statute of limitations defense, we now address it on appeal.

Dewberry bears the burden of establishing that the claims are barred by the statute of limitations, and where the material facts are in dispute, the issue becomes one for the jury. *Brown v. Finger,* 240 S.C. 102, 124 S.E.2d 781, 786 (S.C. 1962). Pursuant to South Carolina's discovery rule, the three-year

limitations period begins to run "where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist." *Wiggins v. Edwards,* 314 S.C. 126, 442 S.E.2d 169, 170 (S.C. 1994) (citing *Snell v. Columbia Gun Exchange, Inc.,* 276 S.C. 301, 278 S.E.2d 333, 334 (S.C. 1981)); *see Graniteville Co., Inc. v. IH Serv., Inc.,* 316 S.C. 146, 447 S.E.2d 226, 228 (S.C. Ct. App. 1997) (holding that plaintiff could not have known of its potential cause of action until an expert determined the cause of the fire). Under this rule, the statute of limitations is triggered when the plaintiff discovers the *injury,* not when he discovers the *identity* of another alleged tortfeasor. *See Wiggins,* 442 S.E.2d at 170.

Columbia Venture alleges professional malpractice among other claims. In some professional malpractice cases, South Carolina courts have found that the potential claim was or should have been discovered not when the plaintiff had knowledge of the injury but when the plaintiff had reason to know that the injury alone was the result of wrongful conduct by the professional. *See Garner v. Houck,* 312 S.C. 481, 435 S.E.2d 847, 849 (S.C. 1993) (finding that a jury question was presented as to when the plaintiff knew or should have known that he had a cause of action against doctors for negligence that caused a family member's death); *True v. Monteith,* 327 S.C. 116, 489 S.E.2d 615, 617 (S.C. 1997) (holding that there was a

question of fact as to when the client learned of the defendant attorney's ethical conflict).

In this case, FEMA adopted its final determination for Columbia Venture's property on August 20, 2001. Columbia Venture brought this action on September 13, 2006. It alleges that until FEMA disclosed its reliance on the hydraulic model prepared by Dewberry in April 2005, it did not have reason to know of Dewberry's alleged wrongful conduct. Viewed in the light most favorable to Columbia Venture, the factual allegations of the complaint are sufficient to support a finding that Columbia Venture did not have notice of its potential cause of action against Dewberry until FEMA revealed its use of the hydraulic model provided by Dewberry. Consequently, it is not appropriate to dismiss the complaint under Rule 12(b)(6) on the ground that the claims are time-barred. Therefore, there are no independent state law grounds on which to dismiss the complaint.

III.

We now turn to Columbia Venture's argument that the district court erred in holding that its claims are preempted under a theory of obstacle preemption. Obstacle preemption is a type of conflict preemption authorized by the Supremacy Clause. *Anderson v. Sara Lee Corp.*, 508 F.3d 181, 191-92 (4th Cir. 2007). It applies "where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Freightliner Corp. v.*

Myrick, 514 U.S. 280, 287, 115 S. Ct. 1483, 131 L. Ed. 2d 385 (1995) (quoting *Hines v. Davidowitz,* 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 581 (1941)). This occurs where state law "interferes with the *methods* by which the federal statute was designed to reach [its] goal." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n,* 505 U.S. 88, 103, 112 S. Ct. 2374, 120 L. Ed. 2d 73 (1992) (emphasis added) (internal quotation marks omitted). We have explained that

> [a] decision about [obstacle preemption] requires the court independently to consider national interests and their putative conflict with state interests. . . . [P]reemption under [an obstacle preemption] theory is more an exercise of policy choices by a court than strict statutory construction.

Abbot v. Am. Cyanamid Co., 844 F.2d 1108, 1113 (4th Cir. 1988). Obstacle preemption can apply not only to positive enactments of state law but also to state tort claims alleging violation of a common law duty. *See, e.g., Geier v. Am. Honda Motor Co.,* 529 U.S. 861, 120 S. Ct. 1913, 146 L. Ed. 2d 914 (2000) (holding that negligence action against a manufacturer was preempted because it conflicted with a federal agency standard).

A.

In considering whether Columbia Venture's claims are preempted, we must start with the general presumption that Congress did not intend to preempt

state law. *Abbot,* 844 F.2d at 1112. This presumption is especially strong against "preemption of state remedies like tort recoveries, when no federal remedy exists." *Id.* (citing *Silkwood v. Kerr-McGee Corp.,* 464 U.S. 238, 251, 104 S. Ct. 615, 78 L. Ed. 2d 443 (1984)). Because "[t]he purpose of Congress is . . . the 'ultimate touchstone' of a preemption analysis," we first examine the purposes of the NFIA. *See Anderson,* 508 F.3d at 192 (citing *Cipollone v. Liggett Group, Inc.,* 505 U.S. 504, 516, 112 S. Ct. 2608, 120 L. Ed .2d 407 (1992)).

In 1968, Congress established the National Flood Insurance Program ("NFIP") in response to recurring flood disasters that were "placing an increasing burden on the Nation's resources." *Studio Frames Ltd. v. Std. Fire Ins. Co.,* 483 F.3d 239, 243 (4th Cir. 2007) (quoting 42 U.S.C. § 4001(a)). In the face of the high risk of such disasters, private insurance companies were not offering flood insurance on flood-prone property. *Id.* Congress responded to this increasing problem by creating the NFIP "which (1) makes federally subsidized flood insurance available in flood-prone areas and (2) encourages states and localities to adopt land use policies and regulations that reduce the risk of flood damage." *Id.* (citing § 4001(a)-(e)). In order for communities to be eligible for federal flood insurance under the NFIA, they are required to adopt community floodplain ordinances in accordance with flood hazard maps promulgated by FEMA. § 4012(c).

FEMA is responsible for administering the NFIP and, in doing so, it maps flood elevations to identify flood hazards. *See Columbia Venture, LLC,* 562 F.3d at 292; 42 U.S.C. §§ 4011, 4101. FEMA is authorized to hire private contractors to carry out studies and investigations on its behalf. § 4102(a). FEMA is expected to constantly reappraise the program and to expeditiously identify and disseminate information about flood-prone areas. *See* §§ 4001(e)(5), 4002(b)(2).

In creating and updating its flood maps, FEMA is first required to publish proposed flood elevation determinations for comment in the Federal Register and in a prominent local newspaper. 42 U.S.C. § 4104(a). Any property owner affected by a proposed determination who wants to challenge it is required to appeal to the local government during the 90-day period following publication. § 4104(b). A landowner can appeal on only one basis: that the proposed determination is "scientifically or technically incorrect." § 4104(b). The chief executive officer of the community is then required to determine whether the evidence is sufficient to justify an appeal on behalf of the community. § 4104(c). Even if the community does not appeal the determination, the Director of FEMA is required to review the appeals made by private persons. § 4104(d). The Director is required to modify his proposed determination "as may be appropriate" after considering any scientific information presented and to publish a final determination. § 4104(d), (e).

After receiving notice of the Director's final determination, an appellant has 60 days to appeal

that determination in federal district court. § 4104(g). Significantly, "the *sole relief* which shall be granted . . . is a modification of the Director's proposed determination." § 4104(b) (emphasis added).

Section 4104 is a product of the careful balancing of the interests of affected landowners and communities and the purposes of the NFIA. The legislative history of the appeals procedure describes Congress' effort "to provide an equitable balancing of all of the interests involved in the identification and the setting of construction elevation standards for flood-prone areas." S. Rep. No. 93-583 (1973), *reprinted in* 1973 U.S.C.C.A.N. 3217, 3230. *See Reardon v. Krimm,* 541 F. Supp. 187, 189 (D. Kan. 1982) ("The decision by Congress to adopt such a limited scope of appeal [under § 4104] was . . . not a hasty one, nor is it one which may be overlooked by the Court."). While accommodating landowners' concerns in the review process, Congress specifically recognized "the vested interests of many land developers and others in avoiding or deferring all limitations on flood plain development as long as possible." 1973 U.S.C.C.A.N. at 3232. This interest conflicts with the NFIP's "need for rapid implementation of the flood insurance program." 1973 U.S.C.C.A.N. at 3232. Therefore, Congress took into account the competing interests when it set forth the limited appeals process.

B.

As the district court observed, state law causes of action against FEMA's independent contractors undermine the primary purposes of the NFIA to strike a balance between protecting property owners' right to appeal flood elevation determinations and the government's interest in minimizing the costs inherent in updating flood maps in order to provide flood insurance. The cost of defending such claims against independent contractors in Dewberry's position will be transferred to FEMA through increased contract fees. *See Boyle v. United Tech. Corp.*, 487 U.S. 500, 507-508, 108 S. Ct. 2510, 101 L. Ed. 2d 442 (1988) (finding that the imposition of liability on government contractors will either raise the price of contracts or cause contractors to decline to contract). This would increase the financial burden on the Treasury and hinder FEMA's efforts to implement the flood insurance program, thus destroying the balance struck by Congress in promulgating the NFIA.

Additionally, permitting affected property owners to bring state law tort claims against independent contractors hired by FEMA would undermine the limited appeals process chosen by Congress to enable FEMA to constantly reappraise the program and to expeditiously identify and disseminate information about flood-prone areas. The appeals provision provides for a review process under which the *only* basis for challenging a proposed determination is evidence showing that the determination is scientifically or technically incorrect, § 4104(b), and the *only* available

remedy is modification of the determination. § 4104(b).

By bringing this action against Dewberry, Columbia Venture seeks to circumvent the limits imposed under § 4104 in order to obtain monetary relief based on alleged scientific and technical errors made by Dewberry and relied on by FEMA in making its flood elevation determination. As noted above, Columbia Venture lost its administrative appeal against FEMA pursuant to § 4104, and it now proceeds against Dewberry for another bite at the apple. Such litigation costs will certainly be passed on to FEMA, and litigation involving its flood elevation determinations will likely delay FEMA's identification and mapping of flood-prone areas. This result is precisely what Congress was trying to avoid when it enacted the limited appeals process of § 4104. We conclude that state law tort claims against FEMA's independent contractors would be an obstacle to the accomplishment of the primary purposes of the NFIA and § 4104. Therefore, the district court properly concluded that Columbia Venture's claims are preempted.

IV.

Accordingly, the judgment of the district court is affirmed.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Columbia Venture, LLC, Plaintiff, v. Dewberry & Davis, LLC, Defendant.	)	C/A No. 3:06-2525-MBS ORDER

Plaintiff Columbia Venture, LLC ("CV") is a South Carolina limited liability company that owns land along the Congaree River in Richland County, South Carolina. In the late 1990s, the Federal Emergency Management Agency ("FEMA") initiated a restudy of flood hazard determinations for the Congaree River floodplain in Richland County. FEMA conducted this restudy pursuant to authority granted under the National Flood Insurance Act of 1968 ("NFIA"), codified at 42 U.S.C. §§ 4001, et seq. Defendant Dewberry & Davis, LLC ("Dewberry"), a Virginia limited liability company, was hired by FEMA as an Independent Study Contractor to provide engineering and other services for this restudy. CV alleges that Dewberry provided FEMA with a flawed hydraulic model, which FEMA used to determine that a portion of CV's land fell within the designated floodway. As a result of this determination, CV's plans to develop the land were frustrated and the value of its land significantly decreased. CV brought this action against Dewberry, alleging state

law causes of action for civil conspiracy, professional malpractice, injurious falsehood, and unfair trade practices.

This matter is before the court on Dewberry's Motion to Dismiss CV's Second Amended Complaint (Entry 155), filed on September 25, 2007. CV filed its response in opposition on October 27, 2007. Dewberry filed a reply on November 13, 2007. FEMA filed a Statement of Interest in Support of Dewberry's Motion to Dismiss on November 9, 2007.[1] Oral argument was held on January 15, 2008.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(6) provides for dismissal "for failure to state a claim upon which relief maybe granted." Fed. R. Civ. P. 12(b)(6). When evaluating a motion to dismiss, the court must accept the factual allegations pled in the complaint as true. *See id.* (citing *Jenkins v. McKeithen,* 395 U.S. 411, 421-22 (1969)). In order to prevail on a motion to dismiss for failure to state a claim upon which relief may be granted, the moving party must show beyond doubt that the plaintiff can prove no set of facts supporting his claim which entitles him to relief. *See*

[1] FEMA filed its Statement of Interest pursuant to the authority granted by 28 U.S.C. § 517. 28 U.S.C. § 517 states that, "any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States. . . ."

Trulock v. Freeh, 275 F.3d 391, 405 (4th Cir. 2001) (citing *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957); *Labram v. Havel,* 43 F.3d 918, 920 (4th Cir. 1995)).

DISCUSSION

Dewberry contends that CV's second amended complaint should be dismissed for five reasons. First, Dewberry argues that CV's entire second amended complaint should be dismissed because it is impliedly pre-empted by the NFIA. Second, Dewberry argues that CV has no standing to sue Dewberry under any theory contained in the second amended complaint. Third, Dewberry argues that CV's civil conspiracy claim should be dismissed for failure to allege special damages. Fourth, Dewberry argues that CV's injurious falsehood claim should be dismissed because CV has not and cannot allege Dewberry made or published a false statement. Fifth and finally, Dewberry argues CV's unfair trade practices claim, brought pursuant to the South Carolina Unfair Trade Practices Act ("SCUTPA"), S.C. Code Ann. §§ 39-5-10, et seq., should be dismissed because CV has not met the three elements required to assert a SCUTPA claim. In the alternative, Dewberry claims that SCUTPA does not apply because engineering is a heavily regulated industry that is not subject to the SCUTPA. Because the court finds preemption to apply, it will address only that ground for dismissal.

I.

Dewberry argues that CV's state law causes of action are preempted by the National Flood Insurance Act of 1968 ("NFIA"). Generally, state law is preempted under the Supremacy Clause in three ways. *See English v. Gen. Elec. Co.*, 496 U.S. 72, 78 (1990); *Mich. Canners & Freezers Ass'n, Inc. v. Agric. Mktg. & Bargaining Bd.*, 467 U.S. 461, 469 (1984); *Abbot v. Am. Cyanamid Co.*, 844 F.2d 1108, 1111 (4th Cir. 1988). First, state law is expressly preempted when Congress explicitly states that federal law preempts state law. *See English*, 496 U.S. at 78; *Mich. Canners & Freezers Ass'n, Inc.*, 467 U.S. at 469; *Abbot*, 844 F.2d at 1111. Second, when Congress has not explicitly stated its intent to preempt state law, Congress's intent may be implied through field preemption. *See English*, 496 U.S. at 79. Under field preemption, Congress's intent to preempt may be implied from a showing that Congress intended to occupy the entire field of regulation. *See English*, 496 U.S. at 79; *Mich. Canners & Freezers Ass'n, Inc.*, 467 U.S. at 469; *Abbot*, 844 F.2d at 1111. Third, even when Congress's intent is neither express nor implied, state law is preempted to the extent that it conflicts with federal law. State law conflicts with federal law when it is impossible to comply with both federal and state law, or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *English*, 496 U.S. at 79 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)); *Mich. Canners & Freezers Ass'n, Inc.*,

467 U.S. at 469 (quoting *Hines*, 312 U.S. at 67); *Abbot*, 844 F.2d at 1111 (quoting *Mich. Canners & Freezers Ass'n, Inc.*, 467 U.S. at 469).

For express and field preemption to exist, there must be a showing of Congress's intent. *See Peal v. N.C. Farm Bureau Mut. Ins. Co., Inc.*, 212 F. Supp. 2d 508, 513 (E.D.N.C. 2002). In contrast, conflict preemption can exist even where there is no manifested intent. *See id.* Additionally, there is a presumption against preemption when Congress has not expressly preempted state law. *Abbot*, 844 F.2d at 1112. Dewberry does not argue that the NFIA contains an express preemption provision. Rather, Dewberry asserts that CV's claims are preempted under the doctrines of field preemption and conflict preemption.

A. Field Preemption

As a preliminary matter, CV's state law causes of action include three common law tort actions and a fourth cause of action based on South Carolina's regulation of unfair trade practices. All four causes of action are based in areas of law that are traditionally occupied by the states. As such, any Congressional intent that the NFIA would preempt these causes of action must be "clear and manifest." *English*, 496 U.S. at 79.

Dewberry asserts that CV's state law causes of action are field preempted because Congress intended FEMA to occupy the field of floodplain management. Dewberry contends that Congressional intent to

occupy the field of floodplain management is implied from the comprehensive statutory framework of the NFIA. Dewberry further contends that Congress provided, as part of the NFIA, an exclusive process for seeking review of FEMA's floodplain determinations, which is an appeal to FEMA and then an appeal to the district court for review of whether FEMA's decisions were arbitrary and capricious. *See* 42 U.S.C. § 4104. Dewberry impliedly argues that allowing CV's state law causes of action is equivalent to allowing state regulation of FEMA's flood mapping process. The court disagrees.

Field preemption involves a showing that Congress intended the federal government to occupy a certain field exclusively. *English*, 496 U.S. at 79. That intent can be inferred from "a 'scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,' or where an Act of Congress 'touches a field in which h [sic] federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" *Id.* (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). At the same time, the existence of a detailed or comprehensive federal regulatory scheme does not, by itself, automatically imply Congressional intent to preempt state law remedies. *See English*, 496 U.S. at 87; *Abbot*, 844 F.2d at 1112. Courts are generally "more reluctant to infer preemption from the comprehensiveness of regulations than from the

comprehensiveness of statutes." *Abbot*, 844 F.2d at 1112.

Dewberry correctly notes that the NFIA and its accompanying regulations are extensive and detailed with respect to floodplain management, which includes flood mapping and flood insurance.[2] It is also true that within this statutory scheme, Congress authorized FEMA to use independent contractors in carrying out the flood mapping process, *see* 42 U.S.C. § 4102(a), and provided a specific method for appealing and obtaining review of FEMA's flood mapping determinations, *see* 42 U.S.C. § 4104. Yet, the NFIA contains no provision, nor is there any accompanying regulation, that specifically addresses how a person may bring an action against FEMA's independent contractors for tortious conduct. The absence of a provision addressing the availability of remedies

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[2] The parties have cited to opinions of federal courts in and outside of the Fourth Circuit that address whether the NFIA preempts state law actions brought against private entities that handle "Write Your Own" insurance claims. As both parties concede, FEMA's flood mapping duties are governed by a different portion of the NFIA than its flood insurance duties. Specifically, the provisions of the NFIA that address the Government's coordination with private insurance companies in handling flood insurance claims is markedly different from the statutory provision that authorizes the use of contractors to conduct studies relating to floodplain management. *Compare* 42 U.S.C. §§ 4011, 4041-4084 *with* 42 U.S.C. § 4102. As such, cases relating to flood insurance procurement and claims handling are distinguishable and provide little guidance in the instant matter.

against independent contractors, without any specific suggestion of preemption in the text or legislative history of the NFIA, leads to a finding that Congress did not intend to preempt these state law actions. *Cf. English,* 496 U.S. at 89 (stating that without a specific suggestion of preemption in the text or legislative history of an act, state law causes of action are not ordinarily preempted because they impose more stringent liability than provided by federal law). Additionally, when there is no federal remedy, the presumption against preemption is stronger. *See Abbot,* 844 F.2d at 1112 (citing *Silkwood v. Kerr-McGee Corp.,* 464 U.S. 238, 251 (1984)). As such, the comprehensiveness of the statutory and regulatory scheme of the NFIA are not enough to imply Congressional intent to preempt CV's state law causes of action under a field preemption theory.

Furthermore, even if Dewberry were able to show that Congress had manifestly and clearly intended to preempt state law, Dewberry would need to show that CV's causes of action fall within the preempted field. A state law falls within a preempted field if it has a direct and substantial effect on that field. *See English,* 496 U.S. at 85. In *English,* the plaintiff was employed by a nuclear-industry facility. *See id.* at 74. She brought a state law claim for intentional infliction of emotional distress, alleging that her employer committed certain extreme and outrageous conduct in retaliation for her whistleblowing activity relating to her employer's failure to follow safety regulations. *See id.* at 77. Defendant asserted that these types of

claims were preempted because of their effect on the preempted field of regulation of "radiological safety aspects involved in the construction and operation of a nuclear plant." *Id.* at 81. The United States Supreme Court recognized that liability arising from these types of claims could have some effect on safety decisions because liability could force employers to address whistleblower's complaints, which in turn might affect the employers' decisions about safety policies. *See id.* at 85. Nonetheless, the *English* Court found that this potential effect was neither direct nor substantial enough to place the employee's intentional infliction of emotional distress claim into the preempted field. *See id.*

In this matter, if Congressional intent were found, the field preempted by the NFIA would be the field of floodplain management, which incorporates flood mapping and judicial review of FEMA's flood hazard determinations. Dewberry argues that if CV's state law causes of action were allowed to proceed, contractors would pass along the risk of potential liability to FEMA in the form of higher fees. Dewberry further argues that this would result in higher costs in the implementation of the NFIA and could threaten the viability of NFIA programs. Dewberry may be correct that allowing CV's state law causes of action to proceed could ultimately result in a negative effect on the field of floodplain management. Yet, like the effect in *English,* this effect is not direct and substantial enough to place CV's state tort claims into the field of regulating floodplain management. *See*

English, 496 U.S. at 85. The court concludes that dismissal is not appropriate on the basis of field preemption.

B. Conflict Preemption

Dewberry argues that CV's state law causes of action stand as obstacles to the accomplishment and execution of the purposes and objectives of the NFIA, and thus should be dismissed under the conflict preemption doctrine. Dewberry contends that there are two main purposes of the NFIA that would be thwarted: 1) the creation of a unified national program that addresses flood disaster losses and provides reasonably priced flood insurance to the public, and 2) the implementation of such a program that minimizes the costs incurred by the federal government in responding to flood disasters.

A state law can be an obstacle to federal purposes "by interfering with the accomplishment of Congress's actual objectives, or by interfering with the *methods* that Congress selected for meeting those legislative goals." *College Loan Corp. v. SLM Corp.*, 396 F.3d 588, 596 (4th Cir. 2005) (citing *Gade v. Nat'l Solid Wastes Mgmt. Ass'n,* 505 U.S. 88, 103 (1992)) (emphasis in original). The Fourth Circuit has stated that "[a] decision about preemption on that ground [frustration of federal purpose] requires the court independently to consider national interests and their putative conflict with state interests. . . . [P]reemption under a frustration of federal purpose theory is more

an exercise of policy choices by a court than a strict statutory construction." *Abbot,* 844 F.2d at 1113.

The general two-fold purpose of the NFIA has been interpreted to be "to protect property owners in flood prone areas from uninsured losses" and to address Congressional concern about the "increasing federal flood relief expenditures." *Peal,* 212 F. Supp. 2d at 512. Congress's articulation of the purposes of the NFIA are set forth at 42 U.S.C. §§ 4001, 4002. Section 4001 states:

> (d) It is therefore the purpose of this title to (1) authorize a flood insurance program by means of which flood insurance, over a period of time, can be made available on a nationwide basis through the cooperative efforts of the Federal Government and the private insurance industry, and (2) provide flexibility in the program so that such flood insurance may be based on workable methods of pooling risks, minimizing costs, and distributing burdens equitably among those who will be protected by flood insurance and the general public.
>
> (e) It is the further purpose of this title to (1) encourage State and local governments to make appropriate land use adjustments to constrict the development of land which is exposed to flood damage and minimize damage caused by flood losses, (2) guide the development of proposed future construction, where practicable, away from locations which are threatened by flood hazards,

(3) encourage lending and credit institutions, as a matter of national policy, to assist in furthering the objectives of the flood insurance program, (4) assure that any Federal assistance provided under the program will be related closely to all flood-related programs and activities of the Federal Government, and (5) authorize continuing studies of flood hazards in order to provide for a constant reappraisal of the flood insurance program and its effect on land use requirements.

(f) Mudslides. . . . It is therefore the further purpose of this title to make available, by means of the methods, procedures, and instrumentalities which are otherwise established or available under this title for purposes of the flood insurance program, protection against damage and loss resulting from mudslides that are caused by accumulations of water on or under the ground.

Section 4002(b) states:

(b) The purpose of this Act, therefore, is to —

(1) substantially increase the limits of coverage authorized under the national flood insurance program;

(2) provide for the expeditious identification of, and the dissemination of information concerning, flood-prone areas;

(3) require States or local communities, as a condition of future Federal financial

> assistance, to participate in the flood insurance program and to adopt adequate flood plain ordinances with effective enforcement provisions consistent with Federal standards to reduce or avoid future flood losses; and
>
> (4) require the purchase of flood insurance by property owners who are being assisted by Federal programs or by federally supervised, regulated, or insured agencies or institutions in the acquisition or improvement of land or facilities located or to be located in identified areas having special flood hazards.

In addition to the articulated purposes for the NFIA, Congress found that the "objectives of a flood insurance program should be integrally related to a unified national program for flood plain management. . . ." 42 U.S.C. § 4001(c)(2). Congress also found that "from time to time flood disasters have created personal hardships and economic distress which have required unforeseen disaster relief measures and have placed an increasing burden on the Nation's resources. . . ." *Id.* § 4001(a)(1).

Allowing state law causes of actions against FEMA's independent contractors does not have a direct impact on floodplain management and mapping decisions. Nevertheless, allowing these state law causes of action to proceed would undermine, at a minimum, two key purposes of the NFIA. First, Congress's efforts to create a program that strikes a balance between protecting property owners from

uninsured flood losses while minimizing the increasing costs to the federal treasury would be undermined. It is not unforeseeable that allowing tort claims against independent contractors, such as Dewberry, would result in the transfer of the costs of potential liability to FEMA through contract fees. It follows that this would result in increased expenditures by the federal government to implement the flood insurance program. This in turn would destroy the balance sought by Congress in promulgating the NFIA.

Second, allowing causes of action to be brought against independent contractors would hinder FEMA's ability to constantly reappraise the flood insurance program and its effect on land use management, *see* 42 U.S.C. § 4001(e)(5), and to expeditiously identify and disseminate information about flood-prone areas, *see id.* § 4002(b)(2). Arguably, Congress sanctioned the use of independent contractors to facilitate the efficient and effective accomplishment of these studies because Congress recognized that the resources of federal agencies are limited. *See id.* § 4102. The prospect of potential liability from state law actions would likely deter some private companies from entering into contracts or from continuing to contract with FEMA. This would decrease the pool of resources available to FEMA to expeditiously identify and distribute information about flood-prone areas, and constantly reappraise the effects on land use management. With fewer resources, FEMA's ability to carry out the Congressional objectives set forth in

§§ 4001(e)(5) and 4002(b)(2) would be significantly diminished.

Additionally, allowing CV's state law causes of action would undermine one of the methods chosen by Congress to reach the balance between protecting property owners from uninsured flood losses while minimizing the increasing costs to the federal treasury. This is the method provided by Congress for appeal and judicial review of FEMA's flood elevation determinations in the NFIA. *See* 42 U.S.C. § 4104. The appeals provision of the NFIA was finalized after much debate and discussion in Congress. *See* S. Rep. No. 93-583, *reprinted in* 1973 U.S.C.C.A.N. 3217, 3230-31. It represents a compromise reached by equitable balancing of the various interests involved. *See id.* Under this process, the only basis for challenging FEMA's flood hazard determinations is an assertion that these determinations are scientifically or technically incorrect. *See* 42 U.S.C. § 4104(b).

CV argues that this method for review is unrelated to its claims because it is not seeking review of FEMA's determination. Rather, CV argues, it seeks relief from injuries caused by Dewberry while Dewberry was performing work for FEMA. CV contends that its claims do not conflict with the judicial review process provided in the NFIA because CV does not seek to challenge FEMA's flood mapping determinations.

It is true that CV seeks relief from Dewberry and not FEMA. It is also true that the relief CV seeks is

monetary compensation and not a reversal of FEMA's flood mapping determinations for the Congaree River floodplain in Richland County. Nevertheless, the main injury that CV alleges it suffered is the reduced value of its land and frustration of its development plans that resulted from the erroneous placement of a large portion of its land in the floodway. CV alleges that the placement of its land in the floodway was erroneous because the floodway determination was based on inaccurate and flawed scientific and technical information. (*See* CV's Second Amended Compl. ¶¶ 10-11.) In fact, each of CV's state law causes of action are founded on the allegation that the science and technology provided by Dewberry, which underlies FEMA's floodway decision, was inaccurate and flawed. (*See* CV's Second Amended Compl. ¶¶ 12, 18(c)-(e), 19, 22, 24.) As such, allowing these state law claims to go forward would obstruct the method Congress chose for entertaining challenges to the scientific and technical information underlying FEMA's flood elevation determinations – a choice made after balancing the purposes of the NFIA.

CV's four remaining arguments as to why the second amended complaint is not preempted under a conflict preemption theory also are without merit.[3]

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[3] In addition to these four remaining arguments, CV repeated its argument that the NFIA appeals process and state law causes of action are not in conflict because they serve different purposes and provide different forms of relief. This argument is without merit for the reasons already discussed.

First, CV argues that allowing state law causes of action against FEMA's contractors would not defeat the purposes of the NFIA appeals process because it would not result in aggrieved landowners substituting state court actions for actions brought under the NFIA. CV argues this is because state law causes of action would require proof that the contractor committed some mistake and could not result in reversal or modification of FEMA's flood hazard determinations. CV may be correct in asserting that allowing state law causes of action against FEMA's contractors would not result in all aggrieved landowners ignoring the NFIA appeals process. Nonetheless, allowing aggrieved landowners to bring state tort claims against contractors results in greater expense to FEMA and impedes the process of identifying and disseminating information about flood-prone areas. As such, allowing state law causes of action would obstruct the purposes of the NFIA.

Second, CV argues that the availability of state law remedies against negligent FEMA contractors will actually promote the purpose of the NFIA to "provide expeditious identification of, and the dissemination of information concerning, flood-prone areas." (*See* CV's Opp. to Dewberry's Mot. to Dismiss at 8.) CV states that the principal means of achieving this purpose is through use of scientifically sound research and accurate modeling analyses. CV further states that allowing state law causes of actions would compel contractors to adhere to appropriate standards of professional care, which will promote the

purpose of expeditious identification and dissemination of information about flood-prone areas. Although the accuracy of information concerning flood-prone areas is important, the purpose of providing expeditious identification and dissemination of information concerning flood-prone areas would not be enhanced by litigation against FEMA's contractors. Rather, allowing state law claims against these contractors would slow down the identification and dissemination process by decreasing the resources available to FEMA to do this work. As discussed herein, imposing state law liability on contractors would result in the reduction of available financial and work force resources and hinder the objective of the NFIA to expeditiously identify and disseminate information concerning flood-prone areas.

Third, CV argues that FEMA's assertion that allowing state law causes of action would allow courts to review FEMA's flood elevation determinations without FEMA's presence is disingenuous because FEMA can intervene as a party to such actions if it wishes. (*See* CV's Response to FEMA's Statement of Interest at 5.) CV's argument actually supports preemption because requiring FEMA to become a party in each state law action brought against its contractors would frustrate Congress's provision for a narrow method of review and appeal of FEMA's floodplain management decisions.

Fourth, CV asserts that the appropriate preemption principles that apply are those relating to the government-contractor defense as articulated in *Boyle*

v. United Techs. Corp., 487 U.S. 500 (1988). CV contends that *Boyle* allows preemption of state tort remedies against government contractors only when the elements of the government-contractor defense are met.[4] CV concludes that its complaint cannot be dismissed based on preemption because the government-contractor defense requires a factual basis, which is a question for the jury to decide.

In *Boyle,* the plaintiff's son was a United States Marine helicopter copilot who was killed when the helicopter he was flying crashed. *See Boyle,* 487 U.S. at 502. The plaintiff sued the Sikorsky Division of United Technologies Corporation for defective repair and defective design of helicopters that United Technologies Corporation provided to the United States. *Id.* at 502-03. The question before the *Boyle* Court was whether a "contractor providing military equipment to the Federal Government can be held liable under state tort law for injury caused by a design defect." *Id.* at 502. The *Boyle* Court noted that federal preemption generally exists when there is "either a clear statutory prescription," or where there is a "direct conflict between federal and state law." *Id.* at 504. The Court further stated that outside of these

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[4] In order to benefit from the protection of the government-contractor defense, a party must show: "(1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States." *Boyle v. United Techs. Corp.*, 487 U.S. 500, 512 (1988).

two areas, state law may be preempted by federal common law in a few areas that involve interests that are uniquely federal. *See id.* After finding that the federal government's procurement of equipment falls into one of these areas of unique federal interest, the Court went on to analyze and find that there was a conflict between this federal interest and the state tort action when the three elements of the government-contractor defense existed. *See id.* at 507, 512.

Contrary to CV's contentions, the *Boyle* case is inapplicable to this matter. First, Dewberry did not assert the government-contractor defense as a basis for preempting CV's second amended complaint. Second, the question with respect to CV's second amended complaint is whether the purposes and objectives of the NFIA, a federal statute, are obstructed by CV's state law causes of action. Dewberry's motion to dismiss does not involve the question of whether CV's state law causes of action conflict with federal common law or the more general federal interest in protecting the federal government's discretionary functions. *See id.* at 511.

The court concludes that CV's second amended complaint is preempted by the NFIA because the state law causes of action asserted therein, "stand[ ] as [ ] obstacle[s] to the accomplishment and execution of the full purposes and objectives of Congress." *English,* 496 U.S. at 79 (quoting *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941)); *Mich. Canners & Freezers Ass'n, Inc.,* 467 U.S. at 469 (quoting *Hines,* 312 U.S. at 67). Based on this finding, a review of Dewberry's

other bases for dismissing CV's second amended complaint is unnecessary.

CONCLUSION

For the reasons stated herein, Dewberry's Motion to Dismiss CV's Second Amended Complaint (Entry 155) is **granted**. CV's second amended complaint is dismissed with prejudice.

IT IS SO ORDERED.

s/ Margaret B. Seymour
Margaret B. Seymour
United States District Judge

Columbia, South Carolina
February 13, 2008

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Columbia Venture, LLC, Plaintiff, v. Dewberry & Davis, LLC, Defendant.	)	C/A No. 3:06-2525-MBS ORDER

Plaintiff Columbia Venture, LLC ("CV") is a South Carolina limited liability company that owns land along the Congaree River in Richland County, South Carolina. In the late 1990s, the Federal Emergency Management Agency ("FEMA") initiated a restudy of flood hazard determinations for the Congaree River floodplain in Richland County. FEMA conducted this restudy pursuant to authority granted under the National Flood Insurance Act of 1968 ("NFIA"), codified at 42 U.S.C. §§ 4001, et seq. Defendant Dewberry & Davis, LLC ("Dewberry"), a Virginia limited liability company, was hired by FEMA as an Independent Study Contractor to provide engineering and other services for this restudy. CV alleged that Dewberry provided FEMA with a flawed hydraulic model, which FEMA used to determine that a portion of CV's land fell within the designated floodway. As a result of this determination, CV's plans to develop the land were frustrated and the value of its land significantly decreased. CV brought this action against Dewberry, alleging state

law causes of action for civil conspiracy, professional malpractice, injurious falsehood, and unfair trade practices.

On September 25, 2007, Dewberry filed a motion to dismiss CV's second amended complaint. CV filed its response in opposition on October 27, 2007. Dewberry filed a reply on November 13, 2007. FEMA filed a Statement of Interest in Support of Dewberry's Motion to Dismiss on November 9, 2007.[1] A hearing was held on January 15, 2008. On February 14, 2008, the court issued a written order granting Dewberry's motion to dismiss and dismissing CV's second amended complaint with prejudice. The court found that CV's second amended complaint was preempted by the NFIA based on conflict obstacle preemption.

This matter now is before the court on CV's motion to amend or alter judgment pursuant to Fed. R. Civ. P. 59(e), filed on February 28, 2008. Dewberry filed a response in opposition on March 17, 2008. CV filed a reply on March 27, 2008. On June 16, 2008, Dewberry filed a supplement to its response in opposition. On July 7, 2008, CV filed a supplement to its motion.

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[1] FEMA filed its Statement of Interest pursuant to the authority granted by 28 U.S.C. § 517. 28 U.S.C. § 517 states that, "any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States. . . ."

Although Rule 59 addresses grounds for new trials, some courts have reasoned that the concept of a new trial under Rule 59 is broad enough to include a rehearing of any matter decided by the court without a jury. 11 Wright & Miller, *Federal Practice & Procedure* § 2804. Notwithstanding the broad nature of Rule 59, motions for reconsideration are disfavored. They are not a matter of routine practice. *Settino v. City of Chicago,* 642 F. Supp. 755, 759-60 (N.D. Ill. 1986). Several courts have observed that they are neither expressly cognizable under the Federal Rules of Civil Procedure nor authorized by the local rules of the district court. *See, e.g., Fisher v. Samuels,* 691 F. Supp. 63, 74 (N.D. Ill. 1988).

Motions for reconsideration are inappropriate merely to introduce new legal theories or new evidence that could have been adduced during the pendency of the prior motion. *Keene Corp. v. Int'l Fidelity Ins. Co.,* 561 F. Supp. 656 (N.D. Ill. 1983), *aff'd,* 736 F.2d 388 (7th Cir. 1982); *see Pacific Ins. Co. v. Am. Nat'l Fire Ins. Co.,* 148 F.3d 396, 403 (4th Cir. 1998)(citations omitted). The Fourth Circuit recognizes only three limited grounds for a district court's grant of a motion under Rule 59(e): (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available earlier; or (3) to correct a clear error of law or prevent manifest injustice. *Hutchinson v. Staton,* 994 F.2d 1076, 1081 (4th Cir. 1993). The Fourth Circuit has emphasized that counsel's mere disagreement with the court's ruling does not warrant a Rule 59(e) motion. *Id.* at

1082 (citing *Atkins v. Marathon LeTourneau Co.*, 130 F.R.D. 625, 626 (S.D. Miss. 1990)).

DISCUSSION

CV asserts that its motion for reconsideration should be granted in order to correct clear errors of law and prevent manifest injustice. First, CV contends that the view of implied preemption in *Gade v. Nat'l Solid Wastes Mgmt Ass'n,* 505 U.S. 88, 103 (1992), is an expansive one which has been abandoned by the Supreme Court in *Bates v. Dow Agrosciences, LLC,* 544 U.S. 431 (2005). CV argues that the court's reliance on *Gade,* is therefore a clear error of law that must be corrected. Second, CV contends that the court failed to apply the holdings of *College Loan Corp. v. SLM Corp.,* 396 F.3d 588 (4th Cir. 2005), and *Abbot v. Am. Cyanamid Co.,* 844 F.2d 1108 (4th Cir. 1988), to the facts of this case and that this failure also constitutes a clear error of law. More specifically, CV argues that the court did not apply the strong presumption against preemption appropriately. Third, CV argues that the court should grant its motion for reconsideration to prevent manifest injustice. CV contends that Dewberry failed to provide its contract with FEMA to CV. CV posits that there may be language in that contract which would have undermined Dewberry's preemption argument. CV concludes that since the contract is a key piece of evidence that CV should have had in order to make its argument about preemption, manifest injustice

would result unless the court's order was amended or altered.

A.

As its first basis for altering the judgment, CV argues that *Bates v. Dow Agrosciences, LLC,* 544 U.S. 431 (2005) shows that the Supreme Court has abandoned its view on implied preemption expressed in *Gade.*[2] Contrary to CV's contention, the Supreme Court in *Bates* did not "virtually abandon[ ]" the view of conflict obstacle preemption articulated in *Gade.* (Plaintiff's Motion to Amend or Alter Judgment at 6.) In fact, the *Bates* case did not involve a review of implied preemption or conflict obstacle preemption. *See Bates,* 544 U.S. at 436. Rather, the Supreme Court reviewed a decision that found that certain state law tort claims were expressly preempted by a provision of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), codified at 7 U.S.C. § 136 et seq. *See id.* The fact that the *Bates* Court addressed express preemption, and not implied preemption, is supported by the Court's extensive statutory analysis of the specific FIFRA provision that set forth the parameters of FIFRA's preemptive effect. *See id.* at 439-44. As such, the fact that *Gade* is not discussed or

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[2] The court notes that the Supreme Court decided the *Bates* case on April 27, 2005, approximately three years before the order granting Dewberry's motion to dismiss was issued in this case. Yet, CV cites to this case for the first time in its Motion to Amend or Alter Judgment.

referenced in *Bates* by the plurality does not support CV's contention that *Gade* has been abandoned. Rather, it shows that the analysis of implied preemption set forth in *Gade* was not relevant to the issue before the *Bates* Court. The *Bates* Court addressed a different legal issue – express preemption – that required a different analysis. Therefore, CV's first basis for altering the judgment based on a clear error of law is without merit.

B.

Second, CV argues that its motion to amend or alter judgment should be granted because the court did not apply the Fourth Circuit's holdings in *College Loan Corp. v. SLM Corp.*, 396 F.3d 588 (4th Cir. 2005), and *Abbot v. Am. Cyanamid Co.*, 844 F.2d 1108 (4th Cir. 1988), to the facts of this case. Although CV recognizes the court referenced both of these cases in its order, CV argues that the court did not apply the strong presumption against preemption appropriately. CV generally re-asserts arguments it previously made in its opposition to Dewberry's motion to dismiss the second amended complaint. (*See* Plaintiff's Response in Opposition to Defendant's Motion to Dismiss (Entry 167) at 3 and 7-8 (arguing there is a strong presumption against preemption; that the absence of a federal remedy strengthens this presumption; and that allowing state law causes of action against independent contractors will support and not conflict with the congressional purpose of ensuring that the identification of flood-prone areas is

scientifically and technically correct).) In other words, CV's arguments relating to the *College Loan Corp.* and *Abbot* cases simply represent CV's disagreement with the court's analysis and application of law to the facts of this case. As such, CV's second ground for relief pursuant to Rule 59(e) is also without merit. *See Hutchinson v. Staton,* 994 F.2d at 1082.

C.

CV's final argument is that unless the court amends or alters its order, manifest injustice will result because Dewberry failed to produce its contract with FEMA. As CV candidly acknowledges, CV initially sought disclosure of the FEMA contract for two purposes: (1) to establish that Dewberry was not a United States employee; and (2) to prove that Dewberry was motivated by money to ignore science and manufacture a floodway on CV's property. (*See* Plaintiff's Corrected Reply Memorandum to Dewberrry's Opposition to Plaintiff's Rule 59(e) Motion (Entry 254) at 13-15.)

CV now contends Dewberry's contract with FEMA deprived CV of evidence that may have undermined Dewberry's preemption argument. CV does not explain why the contract between Dewberry and FEMA is relevant to the issue of preemption. Regardless, CV makes this argument for the first time in its motion to amend or alter judgment. CV did not argue that it needed the contract between Dewberry and FEMA in order to adequately address the preemption

issue in any of its briefs responding to Dewberry's motion to dismiss or FEMA's Statement of Interest in Support of Dewberry's motion to dismiss. CV did not raise this issue during oral argument on Dewberry's motion to dismiss. CV also did not raise this issue at any time after the hearing on Dewberry's motion to dismiss and before the court's order was issued. Generally, "Rule 59(e) motions may not be used . . . to raise arguments which could have been raised prior to the issuance of a judgment. . . ." *See Pacific Ins.Co.*, 148 F.3d at 403 (citations omitted). CV's contention is without merit.

CONCLUSION

For the reasons stated herein, CV's motion to amend or alter judgment (Entry 236) is **denied**.

IT IS SO ORDERED.

/s/ Margaret B. Seymour
United States District Judge

Columbia, South Carolina

September 2, 2008

FILED: June 21, 2010

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-1318

(3:06-cv-02525-MBS)

COLUMBIA VENTURE LLC

Plaintiff-Appellant

v.

DEWBERRY & DAVIS LLC

Defendant-Appellee

and

UNITED STATES OF AMERICA

Party-in-Interest

UNITED STATES OF AMERICA; AMERICAN COUNCIL OF ENGINEERING COMPANIES; AMERICAN COUNCIL OF ENGINEERING COMPANIES OF METROPOLITAN WASHINGTON; AMERICAN SOCIETY OF CIVIL ENGINEERS; ASSOCIATION OF FLOODPLAIN MANAGERS

Amici Supporting Appellee

ORDER

The Court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Motz, Judge Shedd and Senior Circuit Judge Roth.

For the Court

/s/ Patricia S. Connor, Clerk